IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL NO. 1007 OF 1986
With
FIRST APPEAL NO. 1570 OF 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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BANK OF BARODA - Appellant(s)

Versus

SHREE SAINATH SURGICALS DRESSING MFG. CO.PVT.LTD. & 3 – Respondent(s)

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Appearance :
MR. DARSHAN M. PARIKH for Appellant(s).
None for Respondent(s) : 1 - 4.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 12/09/2005 & 13/09/2005

COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

12th September, 2005

1. Mr.Darshan Parikh, learned Counsel, appears and has argued the matters. Though respondents are served, but, nobody appears for them.

2. The appellant is heard. As none appears for the served respondents, we proceed *ex parte* against them.

We have also heard the parties in First Appeal No.1570 of 1986.

3. The appellant has filed First Appeal No.1007 of 1986 against Judgement and Decree dated 1st April, 1986 passed by the learned Civil Judge (S.D.), Godhra in Special Civil Suit No.13 of 1981 being partly dissatisfied against the dismissal of the plaintiff's suit against respondent No.4.

4. Though both the appeals are different and two separate orders are required to be passed by us, but, because of special facts and as the equities are to be adjusted, we are disposing of both the appeals by this common judgment.

5. The short facts necessary for disposal of First Appeal No.1007 of 1986 are that the plaintiff, which is a Nationalised Bank constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, entered into an agreement to extend loan facility in favour of respondent No.1-Company, to secure credit advance in favour of respondent No.1-Company, and they asked for the security, in response to which respondent Nos.2 3 and 4, who also happened to be the Directors of the Company, stood surety jointly and severally and executed a continuing guarantee in favour of the plaintiff-

Bank. As the amount due was not repaid and the obligations were not discharged, the plaintiff-Bank filed a suit for recovery of Rs.16,99,864.72 with interest @ 14½% per annum from the date of the suit till the date of realisation with costs of the suit from the defendants.

5.1 The defendant Nos.1 and 2 as a set and defendant Nos.3 and 4 as the second set filed their separate written statements and raised various contentions. Defendant Nos.1 and 2, so also defendant Nos.3 and 4, submitted that the plaintiff-Bank did not act as a prudent Bank; it did not affix board on the premises, which were under hypothecation/pledge, that it was hypothecated to the Bank; it did not take proper care of the goods nor get the stock, etc. insured, therefore, the Bank was not entitled to the decree. It was also submitted that certain goods were sold to particular parties, who got the bills discounted, but, the Bank failed in making the recovery against such purchasers and as the documents, on which the plaintiff-Bank was placing reliance, were blank at the time of their execution and the plaintiff has filled in the blanks to suit its case and cause, the documents are not binding upon them. Number of other pleadings were also raised.

5.2 The learned trial Court framed as many as seven issues, but, did not frame any issue regarding execution of the blank/filled in documents.

5.3 It appears that during pendency of the suit, defendant Nos.2 and 3, for and on behalf of respondent No.1-Company, admitted the claim of the Bank and submitted an application/purshis (Exh.66) that the Bank's suit may be decreed; though no application or purshis was filed by defendant No.4, but, he had simply submitted an application(Exh.93) that the documents may be read in evidence and had submitted an application (Exh.71) that defendant No.4 was not willing to lead any evidence, the trial Court proceeded to decide the suit. By the impugned judgement, the trial Court, on the strength of the admission made by defendant Nos. 2 and 3, decreed the suit against defendant Nos.1, 2 and 3 and also proceeded to decide the issues on the strength of the pleadings and the documents, which were submitted by the parties before the Court.

5.4 It is to be noted that the issue relating to execution of the blank documents was not cast, nor any evidence was led by the plaintiff or defendant No.4. The trial Court, after hearing the parties, dismissed the suit in the interest of defendant No.4, observing that no decree could be passed against defendant No.4 as he had retired from the Office of the Board of Directors and that there was novation of contract. The plaintiff, being aggrieved by the dismissal of the suit, against defendant No.4, is before this Court with a prayer that in view of the admissions made by defendant No.4, the suit could not be dismissed, especially, when no evidence was

led by the defendants that defendant No.4 had retired from the Office of the Board of Directors and had also failed to prove the fact that there was novation of contract.

6. The short facts of First Appeal No.1570 of 1986 are that M/s.Sainath Surgicals sold and supplied certain articles to the present respondent M/s. Faredeal Surgicals. The documents were sent through the Bank, the present defendant who had opened an account for discounting, retired the documents with an assurance to the Bank that within 30 days of the retirement of the documents, the bill amount shall be paid to the Bank. It is not in dispute before us that after retiring the documents, the goods were received/obtained by the present defendant. The defendant did not honour the words nor paid the amount within 30 days as stipulated between the parties, the plaintiff-Bank issued notice to the defendant for depositing the amount and on failure of the defendant, filed Suit No.30 of 1981.

6.1 In the suit registered as Special Civil Suit No.30 of 1981, the plaintiff-Bank submitted that in accordance with the arrangement entered into between the plaintiff and the defendants, the defendant was extended certain facilities of retiring the documents and the defendant was obliged to make payment within 30 days and on expiry of the period, the defendant was answerable to interest. The defendant, after the notice, filed its written statement and submitted that there was a dispute between M/s.Sainath Surgicals and the present

defendant-respondent, M/s.Faredeal Surgicals, in relation to quality and quantity of the goods, with intervention of certain persons, accounts between the two i.e. the buyer and the seller, were settled and the plaintiff's suit was bad because this very amount was included in the suit, which was filed by the Bank against M/s.Sainath Surgicals, which was registered as Special Civil Suit No.13 of 81.

6.2 After casting issues, the learned trial Court allowed the parties to lead evidence. After giving due opportunity of hearing to the parties, the learned trial Court observed that the plaintiff could successfully prove that the defendant was liable to pay Rs.38,915.46 to the plaintiff. The Court also observed that the defendant could not prove the alleged compromise between the defendant and M/s.Sainath Surgicals or between M/s. Sainath Surgicals and the present respondent - Faredeal Surgicals. The Court also found that the suit was not bad for non-joinder of necessary parties, but, while discussing Issue No.3, the Court observed that as the plaintiff-Bank had already filed the suit for recovery of the larger amount, which includes this amount of Rs. 38,915.46, the plaintiff would not be entitled to get yet one more decree in its favour against the present defendant. Being aggrieved by the said judgment and decree, the plaintiff-Bank has filed First Appeal No.1570 of 1986 and being partly aggrieved by the decree granted in Special Civil Suit No. 13 of 1981, it preferred First Appeal No.1007 of 1986.

7. Mr.Darshan Parikh, learned Counsel for the appellant in First Appeal No.1007 of 1986, after taking us through the pleadings and the judgement of the Court below, submitted that if any issue was not cast and defendant No.4 did not lead any evidence in support of his contention, then, the burden to prove a particular fact being on the defendants and the particular facts, for which no pleadings were raised, nor issues were cast, the suit could not be dismissed against defendant No.4.

8. It is to be seen from the records that defendant Nos. 1 and 2 on one side and defendant Nos.3 and 4 on the other side, had filed separate written statements. The defendant Nos.1 and 2, so also defendant Nos.3 and 4, submitted that the documents though bear their signatures, but, the signatures were obtained on the blank documents; they were categorical in the written statement that as the documents were blank at the time of execution, the same would not bind their interests. Unfortunately, on a material pleading like this that whether the document was blank or not and whether it would bind the defendants or not, no issue was cast by the Court below. The trial Court, while being alive to paragraphs 16, 22 and 23 of the written statement, did not take into consideration the further pleadings that the documents at the time of their execution were blank.

9. It is trite law that an admission would bind the party if it is clear, clinching and does not create any doubt in the mind of the person, who is appreciating it. It is also equally true that the admission, which is qualified or restricted, would not bind the party unless it is shown to the Court that the pleadings, raised by the other side or in the defence, are patently illegal.

10. True it is, that the burden to prove the fact that the documents were blank at the time of their execution, was on defendant No.4, but, it also cannot be argued that the basic burden to prove that the document was a valid document was not on the plaintiff. When the plaintiff comes to the Court submitting, *inter alia*, that on execution of a particular document, the defendant has bound himself to certain obligations, then, due and proper execution of the documents is required to be proved by the plaintiff. In the present case, unfortunately, none of the parties, so also the learned trial Court, looked into the legality or the admissibility of the documents and the qualified admission made by defendant No.4. We could straightway grant decree against defendant No.4 if the admission was not restricted or qualified, but when the defendant had raised a plea and was submitting material proposition in support of his defence to deny the claim of the plaintiff, then, under Rule-1, Order-XIV of the Code of Civil Procedure, an issue was required to be cast and the duty was cast upon the learned trial Court. It is true that under Rule-

1, Order- XVIII of the Code of Civil Procedure, the burden to prove a particular fact would be on the party, which asserts it, but, if no opportunity is given to a party to lead such evidence, then, such admission, which is qualified or restricted, cannot provide foundation for judgement against such a party.

11. In the present matter, on the material proposition of defence, no issue was cast; neither the plaintiff nor defendant No.4 were required to step in the witness box, nor the parties were informed that in absence of the evidence on the part of the plaintiff or on the part of the defendants, the suit may be dismissed or decreed. We don't think the trial Court was justified in discharging defendant No.4, especially, when the questions relating to novation of contract and retirement from the Board of Directors were not appreciated in their proper perspective.

12. We would remind the learned trial Court that if the plaintiff is bound by his pleading in a case where he seeks a decree, then, the defendants would also be bound by the defence raised in the written statement. So far as the pure question of law is concerned, one is not required to plead or prove law because that would be of universal application, but, when certain facts are pleaded, then, those are required to be proved. In the present matter, the learned trial Court, without appreciating the legal position,

proceeded to decide the matter in favour of defendant No.4 and also without appreciating that the questions relating to retirement of defendant No.4 from the Board of Directors and novation of contract, were not put in issue by casting necessary issues. Though the learned Counsel for the appellant submits that in relation to these two points, defendant No.4 did not raise any pleadings, but, in our considered opinion, it was for the learned trial Court to appreciate the pleading and cast necessary issues and give appropriate opportunity to the parties to prove their respective case.

13th September, 2005

13. Learned counsel for the appellant, in support of the First Appeal No. 1570 of 1986, submitted that once the Court found that there was an arrangement and agreement between the plaintiff and the present defendant and the defendant accepted its liability to make payment, then, the suit ought to have been decreed against the defendant. His submission is that recovery of this amount would enure to the benefit of the plaintiff or to the benefit of M/s. Sainath Surgicals and if the suit stands dismissed, then, the present defendant-respondent would get the benefit by default and would seek unjust enrichment because the respondent would not pay any amount under the agreement to the plaintiff nor would pay anything to M/s. Sainath Surgicals. His submission is that the Court may balance the equity between the parties and direct that the present suit amount shall be reduced from the decree,

which has already been passed in favour of the plaintiff against defendant Nos.1 to 3 of Suit No.13 of 1981 and it may also be taken into consideration by the trial Court during the course of the trial in relation to defendant No.4 in Suit No.13 of 1981 after the remand is made by this Court. He also submits that the plaintiff had filed a purshis (Exh.97) before the trial Court that various suits for recovery of the amount have been filed against number of persons, who had purchased articles from the original defendant-M/s. Sainath Surgicals and had also assured that on recovery of the said amount from such parties, who had retired the documents through the Bank, credit of the same would be given to M/s. Sainath Surgicals.

14. Learned Counsel for the defendant in First Appeal No.1570 of 1986, on the other hand, submits that the Court below was unjustified in recording the findings against the defendant, specially when proper evidence was brought on the record to prove the fact that goods were not of the quality and there was a settlement between the supplier-M/s. Sainath Surgicals and the purchaser – M/s.Faredeal Surgicals. His submission is that the plaintiff cannot be allowed to obtain two independent decrees in relation to one and the same amount.

15. From the findings recorded by the learned trial Court, it would appear that the Court recorded the finding that the defendant itself had produced the bill in question at Exh.63 and from the bill, it was clear that it was discounted by

Voucher No.119 and the same number was written on the Hundi. The Court also observed that it was admitted by the defendant's witness that not even a single farthing was paid by the defendant to the Bank towards the said sale. The defendant had stated before the Court that there was a settlement between the parties and some amount was paid to M/s. Sainath Surgicals, but, the Court on due appreciation of the evidence observed that the defendant failed to prove the fact. Apart from this, it would also be noted that when certain goods are sold by a party to a purchaser through agency of the Bank and receives possession of the goods after giving assurance to the Bank that within a particular period, the amount would be paid to the Bank, then, such party would not be allowed to say that despite retiring of the documents and discounting of the bill, it could adjust or settle the dispute with the original seller. Under the commercial transactions, when certain goods are sold and the documents are sent through the Bank, then, on submission of such bills, the seller receives money from the Bank and the purchaser is entitled to get the goods on payment of certain amount. Qua the purchaser, the Bank becomes a seller because the Bank being in possession of the property in the goods, would be entitled to recover the money from the purchaser either on the spot or in future. Such Bank would also have a lien of unpaid seller on the goods and if the goods are not available, then, such Bank would be entitled to recover the money from such purchaser. In view of the above referred legal position, it would not be necessary for us to look into the

details of the evidence that the defendant could prove the alleged settlement. The defendant was answerable to the Bank after it retired the documents with an assurance that the amount would be paid by the purchaser-defendant to the plaintiff-Bank.

16. The Court has dismissed the suit only on the ground that as the suit has already been filed against M/s. Sainath Surgicals, which also includes this amount, the plaintiff would not be entitled to a decree against the defendant. While making these observations, the Court did not look into the findings recorded by it earlier. The Court had observed that the suit was based on subsequent cause of action and the plaintiff-Bank was able to prove that the defendant had accepted the goods and did not pay the amount as assured by the defendant. The question that the Bank is entitled to recover this very amount from M/s. Sainath Surgical would be a question to be raised by M/s. Sainath Surgicals, but, the present defendant - M/s. Faredeal Surgicals would not be allowed to say that it would not pay any money either to the original seller i.e. M/s. Sainath Surgicals or to the present plaintiff. In any case, if the defendant had accepted its liability to make payment of the amount due under the Hundi after retiring the documents, then, the defendant is obliged to make payment to the plaintiff.

17. In our considered opinion, the lower Court was absolutely unjustified in dismissing the suit on a non-tenable ground.

18. The plaintiff's Suit No.30 of 1981 for recovery of Rs.38,915.46, which includes the principal amount of Rs. 28,360.84, Rs. 28.05 as notice charges and Rs.10,526.57 towards interest till the date of the suit, is decreed with costs throughout. It is also held that the plaintiff shall be entitled to interest on the principal amount of Rs. 28,360.84 at the rate of 12% per annum from the date of the suit till recovery.

19. While maintaining the judgement and decree, against defendant Nos.1, 2 and 3, we set aside the judgement and decree, impugned in First Appeal No.1007 of 1986, passed in favour of defendant No.4 and remand the matter back to the trial Court with a direction to cast necessary issues, which arise from the pleadings of the parties and give them proper opportunity to lead evidence, and decide the matter after the parties have led their evidence. We leave it to the discretion of the trial Court to proceed under Order-XVIII, Rule-1 or ask either of the parties to begin their case.

The First Appeal No.1007 of 1986 to the extent indicated above is allowed. There shall be no order as to costs.

20. Though both the appeals stand disposed of, but, the equity is yet to be balanced. It is hereby directed that this amount of Rs. 28,360.84 and interest upto the date of the

suit and beyond the suit upto the date of recovery would be given adjustment by the plaintiff-Bank to M/s. Sainath Surgicals because this very amount, which is decreed against the present defendant, is also a constituent in the amount, which the plaintiff-Bank is claiming against M/s. Sainath Surgicals. It shall be the duty of the present plaintiff to give such credit to defendant Nos. 1 to 3 against whom decree on compromise has already been passed and to defendant No.4 in case the plaintiff's suit is decreed against him. Two separate decrees be drawn. This adjustment order shall be included in both the decrees.

[***R.S.Garg, J.***]

[***K.M. Mehta, J.***]

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